(27)

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 657

EDWARD ARMSTRONG BELLOW AND McDONALD PRODUCTS CORPORATION,

Petitioners,

vs.

PARK SHERMAN CO., INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

and

BRIEF IN SUPPORT THEREOF.

ALBERT G. McCALEB,
J. DAVID DICKINSON,
Counsel for Petitioners.

THE BUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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Petition for Writ of Certiorari.

Brief in Support of the Petition for Writ of Certiorari.

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PETITION FOR WRIT OF CERTIORARI.

To The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Edward Armstrong Bellow, a subject of the King of England, and McDonald Products Corporation, a corporation of the State of New York, respectfully pray for a writ of certiorari to review a decree of the United States Circuit Court of Appeals for the Seventh Circuit. Such decree (Rec. p. 238) was entered pursuant to an opinion (Rec. p. 235) dated November 6, 1942, in a case entitled *Edward Armstrong Bellow and McDonald Products Corporation, Plaintiffs-Appellants,* v. *Park Sherman Co., Inc., Defendant-Appellee.* Such opinion is reported at 55 U. S. P. Q. 310. A petition for rehearing was denied December 18, 1942 (Rec. p. 239). The mandate of the Circuit Court of Appeals has been stayed to accommodate the instant petition (Rec. p. 239).

Summary Statement of the Matter Involved.

The circumstance that a patentee dealt with no new principles of physics has been recognized as a patent invalidating defense.

The defense thus recognized is strange to American patent law and repugnant to R. S. 4886 (U. S. C. Title 35, Sec. 31).

Petitioners' counsel estimate that such defense, if a defense, will invalidate fully three-fourths of the United States patents in existence.

New principles of physics are only rarely discovered; and but very few patentees have dealt with (or discovered) them.

Your petitioners' Bellow Patent No. 2,219,974 (Rec. p. 169) is for a manufacture, in the nature of an ash tray unit, now commonly known as the bean bag tray. The validity of such patent was the one and only issue before the Circuit Court of Appeals. In deciding that single issue adversely to your petitioners, the Court of Appeals said:

> "Bellow dealt with no new principles of physics." (Opinion—Rec. p. 236.)

On appealing to the Circuit Court of Appeals from the decree of the trial court, your petitioners had presented an assignment of error as follows:

> "5. The court erred in attaching significance to the fact that the patentee Bellow was not 'working with new principles of physics.' " (Assignment of Errors—Rec. p. 163.)

Such fifth assignment of error had been presented because the trial court, in its opinion (Rec. p. 155, line 1) and in its findings (Rec. p. 159, line 29) had set forth, as a reason for holding your petitioners' patent invalid, the circumstance that the patentee Bellow (like the patentees

who had produced the prior art devices presented in the case) was not

"working with new principles of physics".

Thus, it appears that the above quoted statement from the opinion of the Circuit Court of Appeals is not an *obiter dictum*. It disposes of the issue presented by the above quoted fifth assignment of error. Moreover, it constitutes a dangerous precedent because purporting to state a new patent invalidating defense.

Jurisdiction.

1. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C., Sec. 347).

2. The matter to be reviewed arises in a suit under the Patent Laws of the United States, Judicial Code, Sec. 24(7) (28 U. S. C., Secs. 41-7).

3. The questions presented are to be determined under said patent laws.

The Questions Presented.

The questions presented are:

(1) Shall patents (for the inventions and discoveries contemplated by R. S. 4886; U. S. C., Tile 35, Sec. 31) be held invalid because their patentees have dealt with no new principles of physics?

(2) Was the Bellow patent No. 2,219,974 (in respect to which the Circuit Court of Appeals said: "Bellow dealt with no new principles of physics") properly held invalid?

Reasons for Granting the Writ.

Your Honors' discretion should be exercised in favor of granting a writ of certiorari because

(1) The Circuit Court of Appeals for the Seventh Circuit has recognized a patent invalidating defense never previously recognized by the Supreme Court or any other Circuit Court of Appeals.

(2) The defense thus recognized is repugnant to R. S. 4886 (U. S. C., Title 35, Sec. 31).

(3) The circumstance which constitutes such newly recognized defense (*i. e.*, the circumstance that no new principles of physics were dealt with when a patentee happily integrated several individually old elements into an unanticipated problem-solving gadget) is one which will continue to be encountered with great frequency in patent litigation; wherefore it is much to be desired that such question be considered and settled by Your Honors at this time.

For the aforesaid reasons, it is urged that this petition for writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit be granted.

Respectfully submitted,

ALBERT G. MCCALEB,
J. DAVID DICKINSON,
Counsel for Petitioners.

Chicago, Illinois,
January 12, 1943.